

SERVICE DATE - DECEMBER 31, 2001

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34098

RYMES HEATING OILS, INC. – PETITION FOR DECLARATORY ORDER

Decided: December 28, 2001

By pleading tendered on September 11, 2001, and accepted for filing on November 13, 2001,<sup>1</sup> Rymes Heating Oils, Inc. (Rymes), seeks a Board determination that it is entitled to receive service from the New England Central Railroad, Inc. (NECR). Rymes contends that it may receive service from NECR because: (1) Rymes is not a shipper that is to be served exclusively by Springfield Terminal Railway Company (ST) under the trackage rights terms and conditions imposed by the Board's predecessor, the Interstate Commerce Commission (ICC), in a decision served on February 6, 1990; or (2) even if Rymes is a shipper to be served exclusively by ST under the ICC-imposed terms and conditions, ST has failed to meet the terms and conditions of the right to be the exclusive service provider for Rymes. ST replied on October 1, 2001. As discussed below, the Board will institute a declaratory order proceeding to resolve the controversy and uncertainty over the ICC-imposed terms and conditions, and will establish a procedural schedule for the submission of further pleadings by the parties.

PRELIMINARY MATTER

Simultaneously with its reply, ST filed a request that the Board institute this proceeding under the modified procedures at 49 CFR part 1112.<sup>2</sup> In an October 10, 2001 filing, Rymes opposes modified procedure and requests an oral hearing in this matter.<sup>3</sup> Rymes requests oral hearing essentially because ST's reply did not respond to the alleged facts, except to generally

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<sup>1</sup> Rymes initially submitted its pleading as an application on September 11, 2001. The Board determined that the pleading should be processed as a petition for a declaratory order and requested that the appropriate fee be paid. Rymes paid the fee on November 13, 2001.

<sup>2</sup> On October 12, 2001, counsel for Boston and Maine Corporation (B&M) filed a notice of appearance and also requested use of the modified procedures at 49 CFR part 1112, should the Board decide to institute a proceeding.

<sup>3</sup> In separate filings on October 22, 2001, Rymes and ST and B&M have filed proposed procedural schedules. Rymes' schedule contemplates discovery and an oral hearing. ST and B&M's schedule contemplates only the submission of written statements.

admit, deny or claim insufficient knowledge.<sup>4</sup> Rymes has not demonstrated that there are any material matters in dispute that cannot be resolved through written submissions. Therefore, Rymes' request for oral hearing will be denied, and this proceeding will be processed under the modified procedure.<sup>5</sup>

## BACKGROUND

Rymes sells and distributes propane to residential, commercial, industrial and governmental customers located in central and southern New Hampshire. Its distribution facilities are located on the Connecticut River Line (Conn River Line), near Claremont Junction, NH. Rymes is presently served only by ST, but wants to receive service from NECR. NECR owns the Conn River Line and may operate over it subject to the trackage rights of ST.

ST's trackage rights stem from a 1988 ICC decision authorizing the National Railroad Passenger Corporation (Amtrak) to acquire the Conn River Line from B&M subject to trackage rights that would allow B&M to exclusively serve its existing customers. In the same decision, the ICC granted Central Vermont Railway, Inc. (CV), an exemption to acquire the Conn River Line from Amtrak and operate it subject to the B&M trackage rights. The ICC directed the parties to privately negotiate the B&M trackage rights.<sup>6</sup>

CV consummated its acquisition of the Conn River Line along with an interim trackage rights agreement, but when the parties failed to agree upon the final terms and conditions of the B&M trackage rights, CV petitioned the ICC to impose them. In a 1990 decision, the ICC

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<sup>4</sup> In its October 10, 2001 filing and again in a December 14, 2001 filing, Rymes moved to make ST's reply more definite under 49 CFR 1111.5. On December 21, 2001, ST and B&M replied. Under the modified procedure, ST will have an opportunity to fully respond to Rymes' allegations, and Rymes will have an opportunity to rebut ST's response. Therefore, Rymes' motions will be denied.

<sup>5</sup> In its December 14, 2001 filing, Rymes also moved to expedite the procedural schedule and offered to withdraw its request "for a full hearing if that will expedite the granting of the relief it seeks." As discussed above, Rymes has not demonstrated the need for an oral hearing, and therefore we will not hold one. The Board will consider, however, Rymes' desire to expedite this matter in setting the procedural schedule.

<sup>6</sup> See Amtrak—Conveyance of B&M in Conn River Line in VT & NH, 4 I.C.C.2d 761, 804-06 (1988).

imposed trackage rights terms and conditions on the parties.<sup>7</sup> Under the ICC-imposed terms and conditions, B&M was granted the exclusive right to serve all “existing shippers and shippers’ facilities” that were located on the Conn River Line and that received or tendered rail shipments during the 12 months prior to the line’s conveyance to CV on September 9, 1988.<sup>8</sup> B&M’s exclusive right to serve such shippers was expressly conditioned on its making available minimum 3-day per week local set-off and pick-up service and consulting with shippers to ensure that their needs were being met. Under the ICC-imposed terms and conditions, CV and B&M could compete to serve all other shippers on the Conn River Line. In 1994, NECR acquired CV’s interest in the Conn River Line, subject to B&M’s trackage rights.<sup>9</sup> ST was assigned B&M’s trackage rights over the Conn River Line.

Rymes claims that its propane distribution facilities (Distribution Center) on the Conn River Line were constructed in 1995-96 and that the first date on which it received or tendered a shipment by rail was November 1996. It explains that it constructed a new 650-foot rail siding for its Distribution Center, where there have never been any buildings or other structures. The new rail siding connects Rymes to the Conn River Line through track at a facility purchased by Rymes in 1995 and leased to East Coast Steel.

Rymes proffers an exhibit showing ST service failures over the fourth quarter of 2000 and first quarter of 2001. Rymes alleges that these failures occurred during the busiest part of the year for heating fuels. Rymes also alleges that ST failed to consult with it concerning its service needs.<sup>10</sup>

Accordingly, Rymes seeks a Board declaration that it may receive competitive service from NECR because: (1) Rymes is not included as an “existing” shipper or facility under the ICC-imposed terms and conditions; or (2) even if Rymes is found to be an “existing” shipper or facility, ST breached the ICC-imposed terms and conditions and lost its exclusive right to serve Rymes.

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<sup>7</sup> See Amtrak—Conveyance of B&M in Conn River Line in VT & NH, 6 I.C.C.2d 539, 541-57, Appendix (1990).

<sup>8</sup> Id. at 542-43, 560.

<sup>9</sup> See New England Central Railroad, Inc. – Acquisition and Operation Exemption – Lines Between East Alburgh, VT and New London, CT, Finance Docket No. 32432 (ICC served Dec. 9, 1994).

<sup>10</sup> In its affirmative defenses, ST states that “ST’s right to serve Rymes and Rymes’ facility is part of the compensation for the 1988 condemnation of a portion of the Connecticut River Line.” ST, however, does not elaborate on this assertion.

## DISCUSSION AND CONCLUSIONS

The Board has discretionary authority under 5 U.S.C. 554(e) to issue a declaratory order to eliminate a controversy or remove uncertainty. In this case, there is a controversy on the present record concerning the ICC-imposed terms and conditions. Therefore, under the Board's authority at 5 U.S.C. 554(c) and 49 U.S.C. 721, a declaratory order proceeding will be instituted.

The proceeding will be handled under the modified procedure and in accordance with the procedural schedule set forth below.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The request for oral hearing is denied.
2. The motions for a more definitive answer are denied.
3. A declaratory order proceeding is instituted. This proceeding will be handled under the modified procedure, on the basis of written statements submitted by the parties. All parties must comply with the Board's Rules of Practice.
4. Rymes may file a supplemental opening statement by January 10, 2002.
5. ST must file a reply by January 22, 2002.
6. Rymes may file a rebuttal statement by February 1, 2002.
7. This decision is effective on the date of service.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams  
Secretary